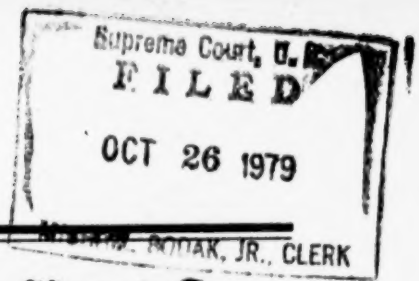


No. 79-407



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**In the Supreme Court of the United States**

OCTOBER TERM, 1979

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HARRY HARPER WAGNER AND  
RUTH N. WAGNER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE THIRD CIRCUIT*

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**MEMORANDUM FOR THE RESPONDENT  
IN OPPOSITION**

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WADE H. MCCREE, JR.  
*Solicitor General  
Department of Justice  
Washington, D.C. 20530*

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Petitioner<sup>1</sup> seeks review of the decision below in this income tax case holding that documented evidence establishing increases in his net worth during 1959-1961 represented unreported taxable income and not expenditures from a preexisting cash hoard.

The pertinent facts may be summarized as follows: During the taxable years at issue, petitioner was a butcher and grocer who bought and slaughtered cattle (Pet. App. 6a-7a; R. 302, 308).<sup>2</sup> Petitioner sold the meat

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<sup>1</sup>"Petitioner" refers to Harry Harper Wagner. Ruth Wagner is a party solely because she filed joint returns with her husband for the years at issue.

<sup>2</sup>"R." refers to the separately bound record appendix filed in the court of appeals.

through his store and through a meat peddling route that utilized several refrigerated trucks. These activities often required petitioner to work until midnight (R. 759-762, 825, 834, 918-920). Petitioner's defense to deficiencies in income tax determined by the Commissioner by means of the net worth method was that the government's computation did not include in cash-on-hand a large cash hoard that he kept in his attic. The Tax Court observed that prior to trial, petitioner denied the existence of any cash hoard (Pet. App. 27a). After characterizing the evidence that no such cash hoard existed as "overwhelming" the Tax Court rejected petitioner's claim as "preposterous" (Pet. App. 26a, 29a).

Petitioner argues (Pet. 7-10) that the evidence regarding the profitability of his grocery business indirectly established the existence of a cash hoard. But there is no necessary correlation between the success of petitioner's grocery and the existence of a cash hoard. At all events, the weight to be given particular evidence of a cash hoard is peculiarly within the province of the trier of fact, and the Tax Court's rejection of petitioner's factual claim is amply supported by the evidence.

Petitioner also contends (Pet. 9) that he "introduced evidence demonstrating \* \* \* [that his] sole source of income could not [have] generate[d] the alleged deficiency." But petitioner's only evidence on this point was the testimony of Stanley Steiner, petitioner's accountant, whose testimony was based largely on figures derived from petitioner's own books and records which the Tax Court determined did not adequately reflect his income (Pet. App. 31a). Moreover, Steiner's calculations failed to take into account the income generated by petitioner's meat business (R. 1037). The Tax Court therefore properly declined to attach any weight to Steiner's testimony (R. 1053, 1159).

2. Contrary to petitioner's further claim (Pet. 7-8) the government need not establish a likely source of unreported income in a net worth case if the government negates all possible sources of nontaxable income. *United States v. Massei*, 355 U.S. 595 (1958). Accord: *United States v. Costanzo*, 581 F. 2d 28 (2d Cir. 1978), cert. denied, No. 78-394 (Jan. 8, 1979); *Foster v. Commissioner*, 487 F. 2d 902 (6th Cir. 1973); *Gatling v. Commissioner*, 286 F. 2d 139 (4th Cir. 1961). Here, petitioner conceded that he had no substantial sources of nontaxable income during the years 1959 through 1961.<sup>3</sup> Thus, there was no requirement that the government establish a likely source for petitioner's unreported income in addition to negating his cash hoard claim, nor was the government obliged to refute petitioner's evidence on the profitability of his grocery store operation. The issue in this case was not whether petitioner failed to report income from his grocery store, but whether the increases in his net worth during the years 1959 through 1961 evidenced unreported taxable income.

The cases upon which petitioner (Pet. 9-10) relies do not conflict with the decision below. In *Commissioner v. Thomas*, 261 F. 2d 643 (1st Cir. 1958), the court remanded the case to the Tax Court for a determination as to whether the taxpayer there had received a large cash gift from a relative, a situation not presented here. *United States v. Bethea*, 537 F. 2d 1187 (4th Cir. 1976), a criminal tax evasion case, involved a claim that the taxpayer inherited a large sum of money which was spent during the prosecution years. The court held that the government failed to disprove this nontaxable source of

<sup>3</sup>In his brief in the court of appeals, petitioner acknowledged (page 25) that he did not have "any substantial sources of nontaxable income for 1959 through 1961."

income. Here, on the other hand, petitioner did not claim that he received an inheritance. *Whitfield v. United States*, 383 F. 2d 142 (9th Cir. 1967), is to the same effect. It likewise involved a claim that the taxpayer's net worth increases were attributable to "large monetary gifts" (383 F. 2d at 145). Under those circumstances, the government was obliged to refute that claim.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.  
*Solicitor General*

OCTOBER 1979